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No. 99-1819

Supreme Court, U.S.
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In The

Supreme Court of the United States

KEVIN NICKERSON, ANGELA NICKERSON, and NEAL HARVILLE,

Petitioners,

vs.

STATE OF TEXAS, *et al.*,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

RESPONSE IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether this Court should deny the petition for writ of certiorari (i) because the Petitioners are procedurally barred from arguing that equitable tolling applies to their claims and (ii) because it would be futile to grant the petition, given that other grounds support the court of appeals' judgment?

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RESPONDENTS BOONE AND MONTGOMERY'S BRIEF IN OPPOSITION

The Respondents Latham Boone and Ray Montgomery respectfully request that the Court deny the petition for writ of certiorari.

STATEMENT OF THE CASE

I. Proceedings below

The Petitioners filed a complaint in federal district court on June 3, 1998, alleging numerous claims, including federal civil rights claims and a variety of state law claims. (Pet. App. at 55a-57a.) The district court dismissed these claims on the Respondents' various motions to dismiss. (Pet. Supp. App. at 13-14.) The Petitioners appealed to the Fifth Circuit, which affirmed the judgment of the district court on a variety of grounds. (Pet. App. at 1a-9a.)

The Petition misleadingly states that all of Petitioners' claims were dismissed on statute of limitations grounds. (Pet. at 5.) In fact, the Fifth Circuit expressly held that the claims related to the prosecution were not time-barred. (Pet. App. at 5a.) The court of appeals affirmed the dismissal of most of the 42 U.S.C. § 1983 claims on grounds having nothing to do with the statute of limitations. (Pet. App. at 5a-7a.) In particular, the appellate court held that absolute prosecutorial immunity barred the claims against Respondents Boone and Montgomery. (Pet. App. at 5a.) The court upheld the dismissal of only two categories of claims under 42 U.S.C. § 1983 on

limitations grounds: (1) claims based on Petitioner Harville's "pre-riot complaints" and (2) claims based on the prison system's "decision to fire them." (Pet. App. at 5a.)

II. Relevant background facts

According to the Original Complaint, a prison riot occurred on October 7, 1994, in a prison facility located in Polk County, Texas. (Pet. App. at 52a.) The Petitioners allege that, during the riot, an inmate named Eric Robinson threw a cup of urine or saliva on Petitioner Angela Nickerson, who was a prison guard at the time. (Pet. App. at 53a.) Nickerson asked for assistance from her husband, Petitioner Kevin Nickerson, who also was a correctional officer. Both Nickersons and the third Petitioner, Neal Harville, went to the inmate's cell. During an alleged scuffle during which the Petitioners tried to "subdue" Robinson, the inmate was injured. (Pet. App. at 53a.) The Petitioners admit that they used "force," but they allege that the force was "reasonable" and defensive. During this same riot, another inmate was injured by another correctional officer and he subsequently died.

The prison system's internal affairs division conducted an investigation following the riot. (Pet. App. at 54a.) As a result of the investigation, all three Petitioners lost their jobs with the Texas prison system, and criminal charges were filed against them.

The criminal charges were prosecuted by Respondents Boone and Montgomery, both of whom were prosecutors employed by a Texas prosecutorial entity called the Special Prison Prosecutors Unit ("SPPU"). The SPPU prosecutes inmates and prison employees who commit

felonies within the Texas prison system. *See* Act of May 23, 1995, H.B. 1, 74th Tex. Legis., ch. 1063, p. 5772 (1995).

In their complaint, the Petitioners allege that, during the prosecution, Boone and Montgomery became aware of exculpatory evidence that had been developed during a separate investigation into the murder of another inmate. The Petitioners allege that the exculpatory evidence was not turned over to their defense counsel. (Pet. App. 54a.) After a trial by jury, the Nickersons were acquitted on June 3, 1996. Ten days later, the prosecutors dismissed the charges against Harville. Thereafter, the Petitioners allege that the prison system refused to reinstate them. Harville also sought expunction of his criminal record. Harville alleges that his records were "expunged, but not completely." (Pet. App. at 54a.)

The Petition asserts that, prior to the riot, the Petitioners had "attempted to remedy wrongs in the prison unit where they worked by repeatedly raising concerns to their supervisors regarding health and safety problems." (Pet. at 3.) They assert that they "were investigated and prosecuted after reporting numerous violations within their prison unit. . . . " (Pet. at 7). In fact, according to the original complaint, only Petitioner Harville made such complaints. (Pet. App. at 48a.) Similarly, while the petition asserts that all three were prosecuted, only Petitioners Angela and Kevin Nickerson were actually prosecuted; the criminal charges against Petitioner Harville were dropped prior to trial. (Pet. App. at 49a.)

REASONS WHY THE PETITION SHOULD BE DENIED

I. The court of appeals correctly held that the Petitioners waived their equitable tolling argument.

The Fifth Circuit correctly determined that the Petitioners waived their equitable tolling argument by failing to raise this issue in their initial brief to the appellate court. (Pet. App. at 5a, n.1.) The term "equitable tolling" is found nowhere in the Petitioner's initial brief in the Fifth Circuit. In contrast, it is extensively discussed in the Petitioners' *reply* brief. The Petitioners' failure to comply with the court of appeals' briefing rules precludes further review of this issue.

The Petitioners protest that they did raise the equitable tolling argument in their initial brief to the Fifth Circuit, referring to a passage in their brief that discussed this Court's decision in *Heck v. Humphrey*, 512 U.S. 477 (1994). (Pet. at 6-7.) This passage of the Petitioners' initial brief addressed the *accrual* of a malicious prosecution claim, not equitable tolling. (Pet. App. at 28a-30a.) In their Petition, the Petitioners draw no distinction between the concepts of accrual and tolling. Rather, they use the two terms interchangeably, which might explain their erroneous assumption that there exists a serious split among the circuits on this issue. At any rate, because the Petitioners failed to adequately raise the issue of equitable tolling in the court below, the Fifth Circuit appropriately declined to consider it, and so, too, should this Court.

II. Most of the Petitioners' claims were dismissed for reasons having nothing to do with the statute of limitations; in particular, the court of appeals held that absolute immunity bars all claims against Respondents Boone and Montgomery.

The Petition states that all of the Section 1983 claims were dismissed on limitations ground. In fact, most of the claims were dismissed for other reasons having nothing to do with limitations. The Petition conveniently omits any discussion of these other grounds. The court of appeals determined that only two categories of claims[1] were barred by the statute of limitations: those based on Petitioners' allegations "about Harville's pre-riot complaints" and those based on the prison system's "decision to fire them." (Pet. App. at 5a.) The court of appeals held that claims based on these allegations "did not require a favorable termination in their criminal cases." (*Id.*) With respect to the bulk of Petitioners' claims, including the malicious prosecution claim, the court of appeals *agreed* with the Petitioners that these claims did not accrue until termination of the criminal proceedings against them. (Pet. App. at 5a.) In short, the Petitioners' broad "Question Presented" is not, in any meaningful sense, actually presented for review.

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[1] The Fifth Circuit categorized the Petitioners' 42 U.S.C. § 1983 allegations as follows: (1) the prison system's alleged failure to heed Petitioner Harville's complaints, (2) the prison system's decision to terminate the employment of the Petitioners, (3) the investigators' tactics during the criminal investigation, (4) the prosecutors' conduct during the prosecution, and (5) the prison system's refusal to reemploy the Petitioners after acquittal or dismissal of the criminal charges. (Pet. App. at 4a-5a.)

Although the court of appeals held that the claims based on the investigation and the prosecution were not time barred, it affirmed the dismissal on other grounds that are not at issue here. In particular, the court held that all claims against the two prosecutors, Boone and Montgomery, were precluded as a matter of law by absolute prosecutorial immunity, citing *Imbler v. Pachtman*, 424 U.S. 409 (1976).[2] (Pet. App. at 5a, 7a.) The Petitioners have not challenged the immunity ruling, which operates as a complete bar to the Petitioners' claims against Boone and Montgomery. For this reason, the Court should deny the Petition.

III. The decision below does not conflict with other circuit court decisions.

The Petitioners argue that the Fifth Circuit's decision conflicts with other circuits on the applicability of the doctrine of equitable tolling to Section 1983 claims. The Petitioners are incorrect. First and foremost, the Fifth Circuit decision does not conflict with any of the decisions cited by the Petitioners for the simple reason that the Fifth Circuit decision contains *no* substantive discussion or holding on equitable tolling. The court declined to issue any ruling at all because it had concluded that the Petitioners had waived their right to argue equitable tolling.

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[2] The court of appeals held that the claims against the Texas prison system were barred by Eleventh Amendment immunity. (Pet. App. at 6a.) It held that the allegations against the investigators were too conclusory to state a constitutional claim. (Pet. App. at 5a.)

Second, the cases involve factually different allegations and claims. The Petitioners cite cases from the Third, Ninth, Sixth, and Seventh circuits that address the accrual of false arrest and false imprisonment claims under the Fourth Amendment. In contrast, the Fifth Circuit opinion addresses the accrual of the Petitioners' *employment* claims, such as their wrongful discharge claim. These types of claims are not at issue in any of the cases cited by the Petitioners.

The courts in the cases cited by the Petitioners were attempting to apply this Court's holding in *Heck v. Humphrey*, 512 U.S. 477 (1994). In *Heck*, this Court examined the accrual of a Section 1983 cause of action based on a person's conviction, confinement, or other harm "whose unlawfulness would render a conviction or sentence invalid." *Id.* at 486. The Court held that, when a judgment in favor of the plaintiff would "necessarily imply the invalidity of his conviction or sentence," the cause of action does not accrue until and if the conviction or sentence is invalidated. *Id.* at 489. Because the cause of action does not even accrue until invalidation of the conviction or sentence, the Court found it "unnecessary" to address the statute of limitations or equitable tolling issues, both of which had been addressed by the lower court in that case. *Id.* at 489.

The Petitioners apparently read *Heck* to apply to the full spectrum of constitutional claims under Section 1983, and not just to claims that "necessarily imply the invalidity of a conviction or sentence." Under *Heck*, however, if the district court determines that a judgment in favor of the plaintiff will not demonstrate the invalidity of a conviction or sentence, "the action should be allowed

to proceed." *Id.* at 487. In short, *Heck* does not change the general rule of accrual for Section 1983 claims. Where, substantively speaking, the outcome of criminal proceedings is irrelevant, the claim must be allowed to proceed. In this case, the Fifth Circuit held that the Petitioners' *employment* claims "did not require a favorable termination in their criminal cases." (Pet. App. at 5a.) This holding does not conflict with *Heck* or any of the cases cited by the Petitioners.

Another deficiency in the Petitioners' analysis is their failure to appreciate the distinction between *accrual* and *tolling*. For example, although all of the cases that they cite involve the question of accrual,[3] the cases from the Third and Sixth circuits actually contain no discussion of equitable tolling. *See Montgomery v. De Simone*, 159 F.3d 120 (3d Cir. 1998); *Smith v. Holtz*, 87 F.3d 108 (3d Cir. 1996); *Schilling v. White*, 58 F.3d 1081 (6th Cir. 1995).

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[3] The Third and Seventh circuits held that false arrest or imprisonment claims accrue at the time of arrest or imprisonment. *See Montgomery v. De Simone*, 159 F.3d 120 (3d Cir. 1998); *Gonzalez v. Entress*, 133 F.3d 551 (7th Cir. 1998). The Ninth and Sixth circuits held that false arrest or imprisonment claims accrue only after criminal charges are dismissed. *See Cabrera v. City of Huntington Park*, 159 F.3d 374 (9th Cir. 1998); *Schilling v. White*, 58 F.3d 1081 (6th Cir. 1995). The decisions from the Seventh and Ninth circuits analyzed tolling. "Although federal law defines the accrual of the claim for a constitutional tort, *state law* supplies the period of limitations and the associated doctrine of tolling." *Gonzalez*, 133 F.3d at 554 (emphasis added). In *Gonzalez*, the court applied Illinois law (133 F.3d at 554), and, in *Cabrera*, the court applied California law (159 F.3d at 378).

In conclusion, the Fifth Circuit decision does not conflict with the decisions of other courts on the issue of equitable tolling. First, the Fifth Circuit opinion does not even address the question of equitable tolling. Second, the cases cited by the Petitioners are factually dissimilar. Because the Petitioners offer no compelling basis for granting the Petition, the Petition should be denied.

CONCLUSION

For these reasons, the petition for writ of certiorari should be denied.

Respectfully submitted,

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